SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 718.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ACHILLES KELLY, GREEN B. KELLY, JR., LILLIAN KELLY CRAWFORD, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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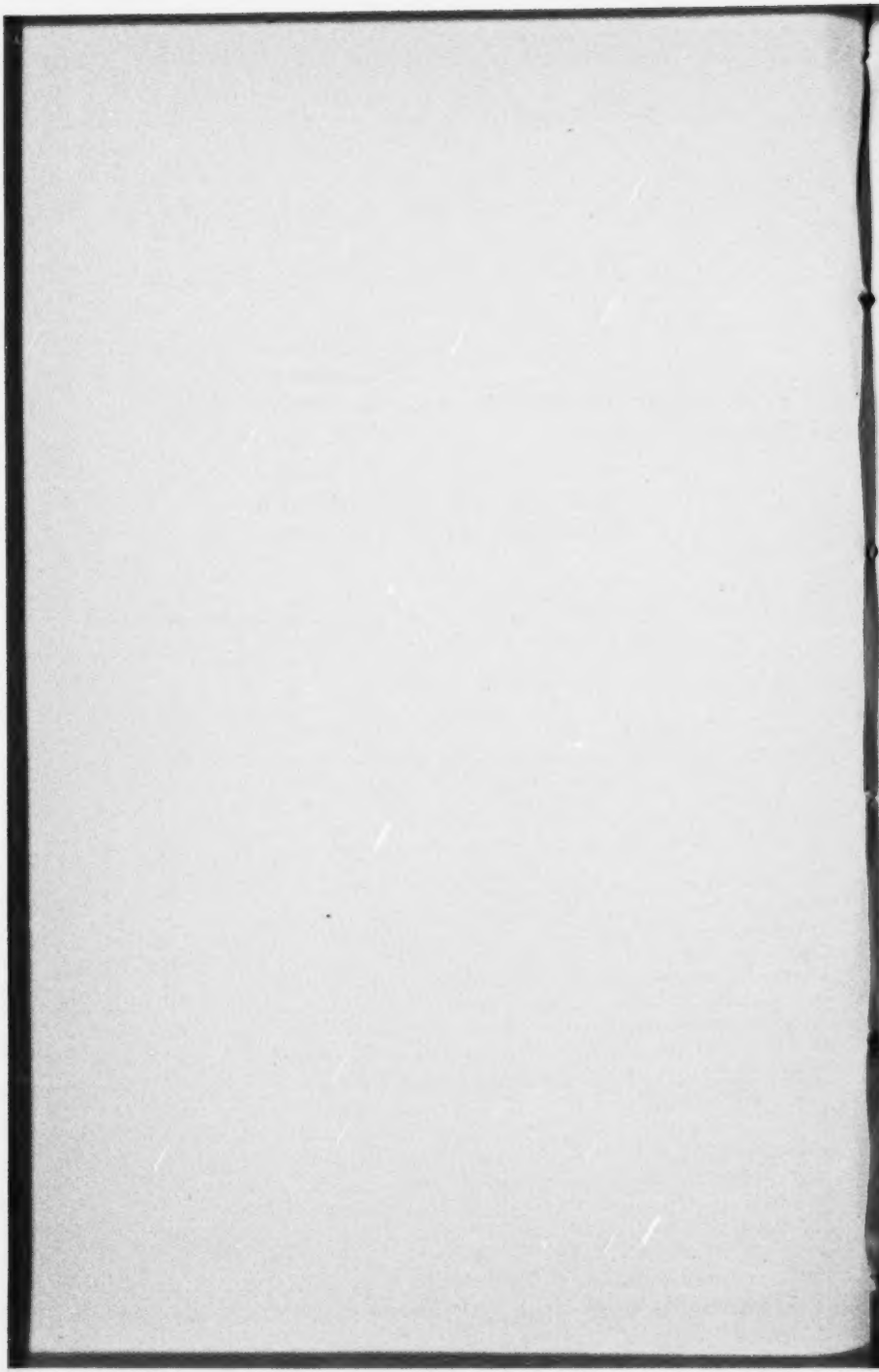

a United States District Court, Eastern District of Kentucky, at Richmond, Kentucky.

ACHILLES KELLY, GREEN B. KELLY, Jr., LILLIAN Kelly, Crawford & Owen Crawford, her husband, Mamie Everett & Luke Everett, her husband, Stella Ashcraft, Nettie Boltz & Oliver Boltz, her husband, Herbert Ashcraft, James Ashcraft, Stanley Kelly, Howell and Hood Howell, her husband, plaintiffs,

versus

UNITED STATES OF AMERICA, CHARLES W. Sale, Nanny Sale Azbill, and A. C. Azbill, her husband, defendants.

Transcript of Record. No. 201.

1 Be it remembered that heretofore, to wit, December 20th, 1913, a petition was filed herein, in words and figures as follows, viz:

United States District Court, Eastern District of Kentucky, sitting at Richmond, Kentucky.

ACHILLES KELLY, GREEN B. KELLY, Jr., LILLIAN Kelly, Crawford & Owen Crawford, her husband, Mamie Everett & Luke Everett, her husband, Stella Ashcraft, Nettie Boltz & Oliver Boltz, her husband, Herbert Ashcraft, James Ashcraft, Stanley Kelly, Howell and Hood Howell, her husband, plaintiffs,

versus

UNITED STATES OF AMERICA, CHARLES W. Sale, Nanny Sale Azbill, and A. C. Azbill, her husband, defendants.

Petition.

2 The plaintiffs, Achilles Kelly, Green B. Kelly, jr., Lillian Kelly Crawford, and Owen Crawford, her husband; Mamie Everett and Luke Everett, her husband; Stella Ashcraft; Nettie Boltz and Oliver Boltz, her husband; Herbert Ashcraft; James Ashcraft; Stanley Kelly Howell and Hood Howell, her husband, say that one Green B. Kelly, sr., departed this life intestate on the 26th day of April, 1900, being at the time of his death a citizen of and domiciled in Estill County, Kentucky, leaving surviving him as his only children and heirs at law the plaintiffs, Achilles Kelly, Green B. Kelly, jr., Lillian Kelly Crawford, Stanley Kelly Howell, and the plaintiffs, Mamie Everett, Stella Ashcraft, Nettie Boltz, Herbert Ashcraft, James Ashcraft, and one Fred Ashcraft, who are the only living children and heirs at law of Mary Kelly Ashcraft, a daughter of said decedent, who died in the lifetime of her father, the said

Green B. Kelly, sr., and the defendants, Charles W. Sale, Nanny Sale Azbill, and one Samuel H. Sale, who were and are the only living children and heirs at law of Susan Sale, a daughter of said decedent, Green B. Kelly, sr., who died before the said Green B. Kelly, sr.

Plaintiffs say that the plaintiffs, Lillian Kelly Crawford and Owen Crawford, are husband and wife; that the plaintiffs, Mamie Everett and Luke Everett are husband and wife; that the plaintiffs, Nettie Boltz and Oliver Boltz, are husband and wife; that the plaintiffs, Stanley Kelly Howell and Hood Howell, are husband and wife; and that the defendants, Nanny Sale Azbill and A. C. Azbill, are husband and wife.

Plaintiffs say that the full names and places of residence of the plaintiffs are as follows: Achilles Kelly, Estill County, Ken-
3 tucky; Green B. Kelly, jr., Estill County, Kentucky; Lillian Kelly Crawford, Clark County, Kentucky; Owen Crawford, Clark County, Kentucky; Mamie Everett, Kansas City, Missouri; Luke Everett, Kansas City, Missouri; Stella Ashcraft, Kansas City, Missouri; Nettie Boltz, Helena, Arkansas; Oliver Boltz, Helena, Arkansas; Herbert Ashcraft, Estill County, Kentucky; James Ashcraft, Estill County, Kentucky; Stanley Kelly Howell, Estill County, Kentucky; Hood Howell, Estill County, Kentucky; and that the defendants, Charles W. Sale, resides in Estill County, Kentucky; and that the defendant, Nanny Sale Azbill, and the defendant, A. C. Azbill, her husband, are nonresidents of the State of Kentucky and are now absent therefrom, and that they reside in Ingersoll, in the State of Oklahoma; and that the place where a post office is kept nearest to where said defendants reside is at Ingersoll, in the State of Oklahoma.

Plaintiffs say that at the time of his death and for more than thirty years prior thereto, the said Green B. Kelly, sr., deceased, was seized in fee simple and in possession of a certain tract of land situated in Estill County, Kentucky, on Millers Creek, containing five and one-half (5½) acres and bounded as follows: Beginning at a hickory on the bank of Millers Creek; thence down said creek as it meanders, N. 82 E. 11, W. 65 E. 6, S. 13 E. 18, S. 14 W. 24, S. 39 W. 12, S. 60 W. 5, to a stone on the bank of said creek; thence N. 53 W. 54 poles to the beginning, containing five acres and including the mill and mill site and a small tract of land lying across and on the east side of said Millers Creek and on the east bank thereof, including the abutments of the mill dam as near in the center as possible, containing one-half acre of land.

4 Plaintiffs say that said tract of land had upon it at the time it was overflowed, injured and damaged as hereinafter set out, a dwelling house of five rooms, a large two-story store house, and a large and valuable water mill, operated by valuable water power afforded by means of a mill dam across the said creek, which was wholly constructed upon said land and belonged, together with all the rights, privileges, and appurtenances of said mill dam and mill site,

to the said Green B. Kelly, sr., at the time of his death aforesaid, and at his death descended to his children and heirs at law as hereinabove set out; that said land was the same land conveyed to the said Green B. Kelly, sr., by deed from James Benton and wife, dated January 7th, 1867, and of record in the office of the clerk of the Estill County Court in deed book N, page 295, a copy of said deed, duly certified by the clerk of the said court, is filed herewith and made a part hereof, marked "A."

Plaintiffs say that the said Samuel H. Sale sold and conveyed all his undivided interest in and to the said tract of land above described to the defendant Charles W. Sale, on the 18th day of June, 1906, by deed which is recorded in said clerk's office in deed book 29, page 420; and they say that the said Fred Ashcraft, by a proper deed, conveyed all his interest in said land to the plaintiff, Nettie Boltz, on the 21st day of July, 1906, which said deed is of record in the office of the said clerk in deed book 27, page 589, a copy of said deed, duly certified by the said clerk, will be filed herewith when or if required.

Plaintiffs say that the said Nettie Boltz is and has been since
5 the last-named date, the owner in fee simple and in possesion of the said interest of the said Fred Ashcraft in said land.

The plaintiffs says that after the dam hereinafter described was constructed as hereinafter set out, the defendant, Green B. Kelly, jr., on the 26th day of April, 1909, sold and conveyed his interest in said land to the defendant Charles W. Sale, who is now and has been since said last named date, the owner of said interest of said Green B. Kelly, jr., in said land.

Plaintiffs say that said two small tracts of land constituted but one tract and boundary and were used for a mill site, milldam and mill, and for the storehouse and dwelling thereon, and constitute but one tract or parcel of land.

Plaintiffs say that between the years 1907 and January 10th, 1909, the defendant, The United States of America, its officers, agents, servants, and employees, constructed a lock and dam upon and across the Kentucky River, in Estill County, Kentucky, a short distance above the town of Irvine and about four miles below plaintiff's said land, whereby the waters of the said river were obstructed and impeded in their natural flow and dammed up and held back up and into said Millers Creek, and upon plaintiff's said land, whereby the natural level of said river was raised at pool level in said Millers Creek and on the lands of the said plaintiffs to the height of at least fifteen feet, when said dam was completed and became filled with water, to wit, in January, 1909.

Plaintiffs say that the said defendant, The United States of America, its officers, agents, servants, and employees have, since same was completed as herein above set out, continuously maintained
6 and operated said lock and dam, and will so continue to maintain and operate same continuously; that the effect of the construction, maintenance, and operation of said lock and dam has been

at all times since the construction thereof and since the 10th day of January, 1909, and will forever be, to form a pool of still or slack water, extending up and into said creek and upon the said lands of the plaintiffs, and that thereby the waters of said creek are, have been and will forever be, obstructed and impeded in their natural flow, and that the said pool of still or slack water thereby formed completely covers and drowns out the said milldam of the plaintiffs so as to render the said dam and mill, storehouse and dwelling absolutely worthless and of no value to the plaintiffs, and when the usual and ordinary hard rains which fall each year during the winter and spring months and throughout the cropping season, fall as they do and will each year, the usual and ordinary tides and freshets thereby caused in said creek and in said river and its tributaries will flow upon the plaintiffs' said lands, and that the waters thereof have been and will be, solely by reason of the construction, operation, and maintenance of said lock and dam, and the pool of still or slack water so formed, continuously forced out of the natural channels and banks of said creek, and will be continuously and periodically during the cropping season, caused to spread out over the plaintiffs' said lands, and will stand upon, remain, and seep through and on plaintiffs' said lands so as to destroy and render worthless at least four acres thereof.

Plaintiffs say that said lock and dam as same are and were designed and constructed, in addition to the immovable parts
7 thereof, are provided and equipped with a steel or iron superstructure known and commonly called a needle, which forms and constitutes a part of said dam as same was designed and is now constructed, which said steel or iron structure is a movable structure placed upon the top of the immovable part of said dam and about six (6) feet in height, and that when same is used as the same was and is designed, constructed, and will be used the said pool of still or slack water formed by said dam will be raised an additional height of about six feet, and that when the same is so used the waters of said creek and river will be further dammed up and held back and impeded in their natural flow to such an extent that all the remainder of said tract of land will be submerged and covered by the usual and ordinary tides and freshets which do and will periodically occur annually, caused by the usual and ordinary hard rains, and that thereby an additional acre of said land, including all the land occupied by said mill, storehouse, and dwelling, will be periodically and annually covered with water to such an extent as to render said mill, storehouse, and dwelling untenantable and worthless, and will render said land, including all of the improvements thereon, worthless and of no market or salable value.

Plaintiffs say that all of said land is valuable creek bottom land and is and has been at all times prior to the injuries herein complained of extremely valuable, fertile, and productive.

Plaintiffs say that by reason of the destruction of said land and the small and insufficient amount of cultivating land left remaining, and by reason of the destruction of said mill site and mill dam, the

remaining land has thereby been injured, damaged, and impaired in value, and the improvements thereon rendered useless and
8 worthless for the purposes of a mill and store and dwelling and for cultivating purposes, whereby said tract of land has been injured and impaired in value in the sum of ten thousand ($10,000.00) dollars.

The plaintiffs say that the plaintiffs and the defendants, Charles W. Sale and Nanny Sale Azbill, have been damaged in the said sum of ten thousand ($10,000.00) dollars, and they say that said defendants, Nanny Sale Azbill and A. C. Azbill, her husband, have refused to unite in this action as plaintiffs.

Plaintiffs say that no proceedings were ever instituted by the United States of America to condemn the plaintiffs' said land, and that no offer was ever made by the said defendant to contract with the plaintiffs for said land nor for the use of same or any portion thereof, and that the plaintiffs have never received any compensation from the said defendant nor from any other person for any of the injuries herein complained of.

Wherefore the plaintiffs pray that said Charles W. Sale, Nanny Sale Azbill, and A. C. Azbill, her husband, be made defendants and required to answer herein; that said defendant, Charles W. Sale, be duly summoned by proper process of this court, and that the said nonresident defendants, Nanny Sale Azbill and A. C. Azbill, be constructively summoned, and they pray that a warning order be issued by this court against them, ordering and warning them to appear and answer in this action; and the plaintiffs pray that the plaintiffs, Achilles Kelly and others, recover judgment against the defendant, The United States of America, in the said sum of ten thousand ($10,000.00) dollars, and therein costs herein expended upon the facts and law of this case and for all proper relief.

9 NETTIE BOLTZ,
LILLIAN KELLY CRAWFORD,
Plaintiffs.

J. F. WINN,
Attorney for Plaintiffs.

The affiant, Nettie Boltz, says that she is one of the plaintiffs in the above-styled action, and that the statements of the foregoing petition are true, as she verily believes.

NETTIE BOLTZ.

Sworn to and subscribed before me by said Nettie Boltz this the 17th day of December, 1913.

ANDREW H. HAMPTON, JR.,
Notary Public.

The affiant, Lillian Kelly Crawford, says that she is one of the plaintiffs in the above-styled action, and that the statements of the foregoing petition are true, as she verily believes.

LILLIAN KELLY CRAWFORD.

Subscribed and sworn to before me by Lillian Kelly Crawford this, the 20th, day of December, 1913.

ANDREW H. HAMPTON, Jr.,
Notary Public.

This indenture, made and entered into this the 7th day of January, 1867, by and between James Benton, of the first part, and G. B. Kelly, of the second part, all of Estill County, State of Kentucky.

Witnesseth: That for the consideration of the sum of twelve hundred dollars in hand paid, the receipt of which is hereby acknowledged, the party of the first part has this day granted, bargained, and sold to the party of the second part a certain tract or parcel of land in Estill County, on Millers Creek, and bounded as follows:

Beginning at a hickory on the bank of Millers Creek, thence down said creek as it meanders N. 82 E. 11 poles, S. 65 E. 6 poles, S. 13 E. 18 poles, S. 14 W. 24 poles, S. 39 W. 12 poles, S. 60 W. 5 poles, to a stone on the bank of said creek; thence N. 3 W. 54 poles to the beginning, including the mill and mill seat and all the rights and privileges and appurtenances thereunto attached or in anywise belonging; and the said Benton also conveys to the Kelly the right of to and from the spring on the adjoining land lately owned by Webber Harris, deceased, and now by his heirs, &c., and close to the boundary aforesaid, which boundary includes five acres,

11 and the said Benton covenants that the said Kelly shall have the free right and use of said spring forever; and the said Benton, for the consideration aforesaid, hereby sells, conveys, and confirms to the Kelly one-half acre of land in addition to the aforesaid five acres on the opposite side of said creek and on the bank thereof, to be laid off in a square as near as possible and to include the abutments of the milldam as near in the center as possible, to be laid off at the expense of said Benton.

To have and to hold the aforesaid tract of land unto the said Kelly, together with all the rights, privileges, and appurtenances thereunto attached or in any wise appertaining or belonging. Also the right of way to and from said spring and the free use of the same forever, free from the claim or demand of the party of the first part.

It is understood between the parties that the party of the second part takes the aforesaid premises, mill &c., subject to the lease of an oil or mineral company, and also subject to a lease of W. G. Kirk on said property. Kelly to have all the right, benefits, and profits of said two leases, or either of them, and the said Benton will forever warrant and defend the title to the aforesaid premises unto the said Kelly against all claims whatever.

In testimony whereof, the said James Benton, together with Fannie C. Benton, his wife, who hereby relinquishes her right of dower in and to the land hereby conveyed, have hereunto set their hands and seals the day and date aforesaid.

JAMES BENTON. (SEAL.)
FANNIE C. BENTON.

12 STATE OF KENTUCKY,
Estill County, sct.

I, Morton M. Price, clerk of Estill County Court, do certify that this deed from James Benton and wife was produced to me in my county on the 28th day of January, 1867, and was acknowledged by James Benton and Fannie C. Benton to be their act and deed for the uses and purposes therein stated, whereupon the same has been recorded in my office duly stamped.

MORTON M. PRICE, *C. E. C. C.*

STATE OF KENTUCKY,
County of Estill, sct.

I, C. T. Grinstead, clerk of the Estill County Court, certify that the foregoing is a true and correct copy of the deed from James Benton and wife to G. B. Kelly as appears of record in my office in deed book "N" at page 295.

Witness my hand as clerk aforesaid at the courthouse in the city of Irvine this 26th day of November, A. D. 1913.

C. T. GRINSTEAD, *Clerk.*
By HARRY B. WILSON,
Deputy Clerk.

13 And on a day following, to wit, June 30th, 1914, an agreed order was entered herein, in words and figures as follows, viz:

ACHILLES KELLY AND OTHERS, PLAINTIFF,
v.
UNITED STATES AND OTHERS, DEFENDANT. } Agreed Order.

This day came the parties, plaintiffs and defendants, by their respective attorneys, and by agreement it is now ordered that all allegations of the petition herein be and they are traversed of record.

And on a day following, to wit, April 20th, 1916, a finding of fact and conclusions of law was filed herein, in words and figures as follows, viz:

14 United States District Court, Eastern District of Kentucky.

ACHILLES KELLY AND OTHERS, PLAINTIFFS,
v.
UNITED STATES AND OTHERS, DEFENDANTS, } No. 201.

This is a suit to recover just compensation for the taking of certain real estate by the erection of Lock and Dam No. 12 on the Kentucky River in this district. I make the following findings of fact, to wit:

1st. That the erection of the lock and dam was completed the latter part of December, 1909, or the first part of January, 1910.

2nd. That at that time the plaintiffs, Achilles Kelly, Lillian Kelly Crawford, Mamie Everett, Stella Ashcraft, Nettie Boltz, Herbert

Ashcraft, and Stanley Kelly Howell, the defendant, Charles W. Sale, were the owners in fee simple and in the possession of a certain tract of land situated in Estill County, Kentucky, on Millers Creek, a branch of the Kentucky River, containing five and one-half ($5\frac{1}{2}$) acres and bounded as follows:

Beginning at a hickory on the bank of Millers Creek; thence down said creek as it meanders N. 82 E. 11 poles; S. 65 E. 6 poles; S. 13 E. 18 poles; S. 14 W. 24 poles; S. 39 W. 12 poles; S. 60 W. 5 poles to a stone on the bank of said creek; thence N. 3 W. 54 poles to the beginning, on which there is a mill and a mill seat, a store building, and residence.

3rd. That the interests of the said parties therein were as follows, to wit:

Achilles Kelly, one-sixth;
Lillian Kelly Crawford, one-sixth;
Mamie Everett, one-thirty-sixth;
Stella Ashcraft, one-thirty-sixth;
Nettie Boltz, one-eighteenth;
Herbert Ashcraft, one-thirty-sixth;
James Ashcraft, one-thirty-sixth;
Stanley Kelly Howell, one-sixth;
Charles W. Sale, one-third.

4th. That by reason of the erection of the lock and dam the mill can no longer be driven by water power. The water above the lock and dam. when it is at pool stage, is about one foot below the crest of the mill dam, which prevents the drop in the current which is necessary to run the mill. The property is not otherwise injured by the lock and dam.

5th. No part of the land or mill is overflowed or covered by a pool stage of water; nor is the mill physically damaged thereby.

6th. Miller's Creek is not a navigable stream.

7th. The mill and store were not abandoned for lack of business before the completion of the lock and dam. The store was put out of business by the construction of the dam and suspension of the mill. But the business of the mill and store had fallen off before the construction thereof and without reference to it.

8th. The land has not been enhanced in value by the construction of the lock and dam.

9th. The damages sustained by the owners of the mill by reason of cutting off the water power I place at $1,500. The record contains very little evidence from which I can determine the real extent of such damages, and I can not see my way clear to place it at any greater sum. This does not include anything on account of the store, as I do not consider that a proper element of recovery. It represents the depreciation of the valuation of the mill property by cutting off the water power.

Judgment should be entered for $1,500.

A. M. J. COCHRAN,
Judge.

And on a day following, to wit, April 24th, 1916, a judgment was filed herein, in words and figures as follows, viz:

17 In the District Court of the United States for the Eastern District of Kentucky.

ACHILLES KELLY & OTHERS, PLAINTIFFS,
vs.
UNITED STATES & OTHERS, DEFENDANTS. } Judgment.

The court having on the 20th day of April, 1916, filed his findings of facts and law herein, finding that the plaintiffs are entitled to judgment in the sum of fifteen hundred ($1,500.00) dollars, it is therefore ordered and adjudged by the court that the plaintiffs, Achilles Kelly, Lillian Kelley Crawford, Mamie Everett, Stella Ashcraft, Nettie Boltz, Herbert Ashcraft, James Ashcraft, Stanley Kelley Howard, and the defendant Chas. W. Sale have and recover of the defendant, the United States of America, the sum of fifteen hundred ($1,500.00) dollars, with interest thereon at the rate of four per cent per annum from this date until paid, and their costs in this action expended to be taxed by the clerk in accordance with the provisions of the statute in such case made and provided.

It further appearing that all the parties of record in this proceeding are of full age and represented by counsel of record and consenting thereto, it is adjudged that said sum be collected

18 by the said J. F. Winn, attorney of record for the plaintiffs, and he is authorized to sign their names to such receipts, vouchers, or other papers as may be necessary for that purpose, to have effect as if they were present and signing same in person. Of this sum it is adjudged that the several parties are entitled as follows: Achilles Kelly, 1/6; Lillian Kelley Crawford, 1/6; Mamie Everett, 1/36; Stella Ashcraft, 1/36; Nettie Boltz, 1/18; Herbert Ashcraft, 1/36; James Ashcraft, 1/36; Stanley Kelley Howard, 1/6; and Chas. W. Sale, 1/3.

To all of which the defendant, The United States of America, objects and excepts.

And on a day following, to wit, August 1st, 1916, an assignment of errors was filed herein, in words and figures as follows, viz:

19 In the District Court of the United States for the Eastern District of Kentucky, held at Richmond, April term, 1916.

ACHILLES KELLY & OTHERS, PLAINTIFFS,
vs.
UNITED STATES & OTHERS, DEFENDANTS. } Assignment of Errors.

The defendant in this action, the United States of America, by its attorney, Thomas D. Slattery, United States attorney for the Eastern

District of Kentucky, in connection with its petition for a writ of error, makes the following assignment of errors, which, it avers, exist:

FIRST.

The court erred in concluding as a matter of law that the plaintiffs are entitled to recover of the defendant the sum of one thousand five hundred ($1,500.00) dollars, because the court's findings of fact show that there was no taking of private property for public use, within the meaning of the fifth amendment to the Constitution.

SECOND.

20 The court erred in adjudging that the plaintiffs recover of the defendant the sum of one thousand five hundred ($1,500.00) dollars.

THIRD.

The court erred in adjudging that the plaintiffs recover of the defendant anything herein, because the findings of fact show that no part of the land or mill is overflowed or covered by a pool stage of water, nor the mill physically damaged thereby.

FOURTH.

The court erred in adjudging that the plaintiffs recover of the defendant anything herein, because the construction of the lock and dam causes the water above the lock and dam to pool and prevents the drop in the current which is necessary to run plaintiffs' mill, as this is not a taking of private property for public use within the meaning of the fifth amendment to the Constitution, but makes out a case of damage without injury; that is, a case sounding in tort and without the jurisdiction of the trial court under the Tucker Act, as amended by the Judicial Code.

FIFTH.

The court erred in adjudging that the plaintiffs recover of the defendant one thousand five hundred ($1,500.00) dollars, or anything herein, because the damages to the plaintiffs' property was
21 purely consequential, speculative, and remote, and there was not a taking of plaintiffs' property for which compensation should be made within the meaning of the fifth amendment to the Constitution.

SIXTH.

The court erred in adjudging a recovery to the plaintiffs against the defendant for the reason that the damages to plaintiffs' land and

property are consequential, speculative, and remote, and the court is without jurisdiction to award damages against the United States in such cases.

SEVENTH.

The court erred in adjudging that the defendant is liable for any costs incurred. Since the repeal by the Judicial Code of section 15 of the Tucker Act there is no provision of law for allowance of costs against the United States in actions under said act.

EIGHTH.

The court erred in entering judgment in favor of the plaintiffs against the defendant.

Wherefore the defendant prays that the judgment be reversed.

THOS. D. SLATTERY,
United States Attorney.

22 And on the same day, to wit, August 1st, 1916, a petition for writ of error was filed herein, in words and figures as follows, viz:

In the District Court of the United States for the Eastern District of Kentucky, held at Richmond, April term, 1916.

ACHILLES KELLY & OTHERS, PLAINTIFFS, *vs.* UNITED STATES & OTHERS, DEFENDANTS.	At law.	Petition for writ of error.

Now comes Thomas D. Slattery, United States attorney within the Eastern District of Kentucky, for and on behalf of the United States, defendant herein, and says:

That on or about the 24th day of April, 1916, this court entered judgment herein in favor of the plaintiffs and against the defendant, The United States of America, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

23 Wherefore the defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

THOS. D. SLATTERY,
United States Attorney.

And on the same day, to wit, August 1st, 1916, an order allowing the writ was entered herein in words and figures as follows, viz:

In the District Court of the United States for the Eastern District of Kentucky, held at Richmond, Kentucky, April term, 1916.

24 ACHILLES KELLY & OTHERS, PLAINTIFFS,
vs.
UNITED STATES & OTHERS, DEFENDANTS. } At law, order allowing the writ.

This 1st day of August, 1916, comes the defendant, The United States of America, by Thomas D. Slattery, United States attorney within the eastern district of Kentucky, and files herein and presents to the court his petition, praying for the allowance of a writ of error and an assignment of errors intended to be urged by him; praying also that a transcript of the record and proceedings and the papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court allows the writ of error.

A. M. J. COCHRAN,
United States District Judge, Eastern District of Kentucky.

25 United States Supreme Court.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:
The President of the United States.

To the honorable the judge of the District Court of the United States for the Eastern District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you, between Achilles Kelly et al. *v.* United States of America et al., No. 201, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington on the* 1st day of September next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 1st day of August, in the year of our Lord one thousand nine hundred and sixteen, and of the independence of the United States of America the one hundred and forty-first year.

J. W. MENZIES,
Clerk of the District Court of the United States.
W. C. BENNETT, *D. C.*

Allowed by
A. M. J. COCHRAN,
District Judge.

I hereby accept service of the within writ, this 10th day of August, 1916.

J. F. WINN,
Atty. for Appellees, except
Chas. W. Sale, Nannie Sale Azbill & A. C. Azbill.

25½ I hereby accept service of the within writ, this 25th day of August, 1916.

HUGH RIDDELL,
Atty. for C. W. Sale, Nannie G. Azbill, Alex C. Azbill.

(Indorsed:) No. 201. United States Supreme Court for the Sixth Circuit. Achilles Kelly et al. vs. United States. Writ of error. Filed Aug. 25th, 1916. J. W. Menzies, Clk. W. C. Bennett, D. C.

26 United States District Court, Eastern District of Kentucky.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss.

To Achilles Kelly, Green B. Kelly, Jr., Lillian Kelly Crawford, and Owen Crawford, Mamie Everett, and Luke Everett, Stella Ashcraft, Nettie Bolyz, and Oliver Boltz, Herbert Ashcraft, James Ashcraft, Stanley Kelly Howell, and Hood Howell, Charles W. Sale, Nannie Sale Azbill, and A. C. Azbill, greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court for the sixth circuit, to be holden at the city of Washington, in said circuit, on the 1st day of September next, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Eastern District of Kentucky, wherein United States of America is appellant and Achilles Kelly et al. is appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, as judge of the said district court, and the seal of said court, at Richmond this 1st day of August, in the year of

*Not exceeding 30 days from the day of signing the citation.

our Lord one thousand nine hundred and sixteen and of our independence the 141st year.

A. M. J. COCHRAN,
Judge of the U. S. District Court,
Eastern District of Kentucky.

I hereby accept service of the within citation this 10th day of August, 1916.

J. F. WINN,
Atty. for Appellees, Achilles Kelly, Green B. Kelly, Lillian Kelly Crawford, Owen Crawford, Mamie Everett, Luke Everett, Stella Ashcraft, Nettie Boltz, Oliver Boltz, Herbert Ashcraft, James Ashcraft, Stanley Kelly Howell, and Hood Howell.

I hereby accept service of the within citation this 25th day of August, 1916.

HUGH RIDDELL,
Atty. for C. W. Sale, Nannie G. Azbill, and Alex C. Azbill.

(Indorsed:) No. 201. U. S. District Court, Eastern District of Kentucky. Achilles Kelly et al. vs. United States et al. Citation. Filed 25th day of Aug., 1916. J. W. Menzies, Clerk. By W. C. Bennett, D. C.

27 In the District Court of the United States for the Eastern District of Kentucky, held at Richmond, Kentucky, April term, 1916.

ACHILLES KELLY & OTHERS, PLAINTIFFS,
vs.
UNITED STATES & OTHERS, DEFENDANTS.
} No. 201.

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28 *Certificate.*

I, J. W. Menzies, clerk of the District Court of the United States for the Eastern District of Kentucky at Richmond, do hereby certify that the foregoing 26 pages contain and full and complete copy of the petition, agreed order June 30th, 1914, traversing of record the

allegations of the petition, findings of fact, and conclusions of law, judgment, assignment of errors, application for writ of error, order allowing writ, writ of error and return thereon, and citation and return in the matter set out in the caption hereto, as the same appears from the records and files of this office. Witness my hand as clerk and the seal of said court at Richmond, this 25th day of August, 1916.

[SEAL.]

J. W. MENZIES, *Clerk.*
W. C. BENNETT, *D. C.*

29 United States District Court, Eastern District of Kentucky.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss.

To Achilles Kelly, Green B. Kelly, jr., Lillian Kelly Crawford and Owen Crawford, Mamie Everett and Luke Everett, Stella Ashcraft, Nettie Boltz and Oliver Boltz, Herbert Ashcraft, James Ashcraft, Stanley Kelly Howell and Hood Howell, Charles W. Sale, Nannie Sale Azbill and A. C. Azbill, greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, on the 1st day of September next, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Eastern District of Kentucky, wherein United States of America is appellant and Achille Kelly et al. is appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand as judge of the said district court, and the seal of said court, at Richmond this 1st day of August, in the year of our Lord one thousand nine hundred and sixteen and of our Independence the 141st year.

A. M. J. COCHRAN,
Judge of the U. S. District Court, Eastern District of Kentucky.

I hereby accept service of the within citation this 10 day of August, 1916.

J. F. WINN,
Atty. for appellees, Achilles Kelly, Green B. Kelly, Lillian Kelly Crawford, Owen Crawford, Mamie Everett, Luke Everett, Stella Ashcraft, Nettie Boltz, Oliver Boltz, Herbert Ashcraft, James Ashcraft, Stanley Kelly Howell, and Hood Howell.

I hereby accept service of the within citation this 25 day of August, 1916.

HUGH RIDDELL,
Atty. for C. W. Sale, Nannie G. Asbill, Alex C. Asbill.

(Indorsed:) No. 201. U. S. District Court, Eastern District of Kentucky. Achilles Kelly et al. vs. United States et al. Citation. Filed 25 day of Aug., 1916. J. W. Menzies, Clerk. By W. C. Bennett, D. C.

30 United States Supreme Court for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss.

The President of the United States.

To the honorable the judge of the District Court of the United States for the Eastern District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you, between Achilles Kelly et al. *v.* United States of America, No. 201, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington on the* 1st day of September next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the 1st day of August, in the year of our Lord one thousand nine hundred and sixteen and of the independence of the United States of America the one hundred and forty-first year.

J. W. MENZIES,
Clerk of the District Court of the United States.
W. C. BENNETT, *D. C.*

Allowed by
A. M. J. COCHRAN,
District Judge.

I hereby accept service of the within writ this 10 Aug., 1916.

J. F. WINN,
Atty. for Appellees, except Chas. W. Sale, Nannie Sale Asbill, and A. C. Asbill.

* Not exceeding 30 days from the day of signing the citation.

I hereby accept service of the within writ, this 25 day of August, 1916.

HUGH RIDDELL,
Atty for C. W. Sale, Nannie G. Asbill, Alex. C. Asbill.

(Indorsed:) No. 201. United States Supreme Court for the Sixth Circuit. United States, plff. in error, vs. Achilles Kelly, writ of error. Filed Aug. 25, 1916.

J. W. MENZIES, *Clerk.*
W. C. BENNETT, *D. C.*

(Indorsement on cover:) File No. 25548. E. Kentucky, D. C. U. S. Term No. 718. The United States, plaintiff in error, *vs.* Achilles Kelly, Green B. Kelly, jr., Lillian Kelly Crawford et al. Filed October 11th, 1916. File No. 25548.

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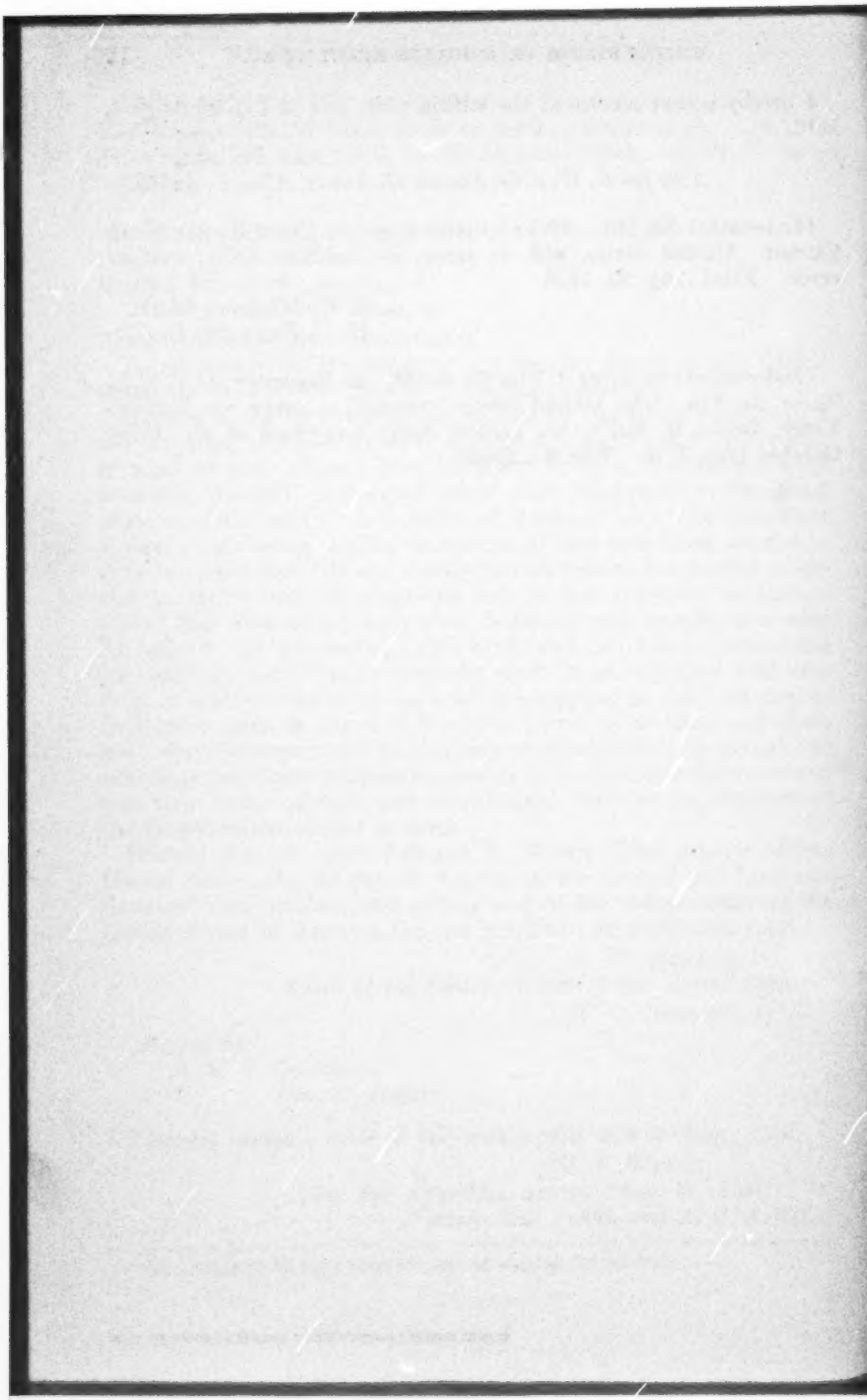


In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ACHILLES KELLY, GREEN B. KELLY, JR., Lillian Kelly Crawford, et al.
No. 718.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

As the findings herein are very brief, contain most of the essential facts, and indicate the ground upon which the court rendered its judgment, the material portions are herewith set forth in lieu of a statement of the facts in the case.

> This is a suit to recover just compensation for the taking of certain real estate by the erection of Lock and Dam No. 12 on the Kentucky River in this district. I make the following findings of fact, to wit:
>
> 1st. That the erection of the lock and dam was completed the latter part of December, 1909, or the first part of January, 1910.

2nd. That at that time the plaintiffs * * * were the owners in fee simple and in the possession of a certain tract of land situated in Estill County, Kentucky, on Millers Creek, a branch of the Kentucky River, containing five and one-half (5½) acres, * * * on which there is a mill and a mill seat (site), a store building, and residence.

3rd. That by reason of the erection of the lock and dam the mill can no longer be driven by water power. The water above the lock and dam, when it is at pool stage, is about one foot below the crest of the mill dam, which prevents the drop in the current which is necessary to run the mill. The property is not otherwise injured by the lock and dam.

4th. No part of the land or mill is overflowed or covered by a pool stage of water; nor is the mill physically damaged thereby.

5th. Millers Creek is not a navigable stream.

6th. The mill and store were not abandoned for lack of business before the completion of the lock and dam. The store was put out of business by the construction of the dam and suspension of the mill. But the business of the mill and store had fallen off before the construction thereof and without reference to it.

7th. The land has not been enhanced in value by the construction of the lock and dam.

8th. The damages sustained by the owners of the mill by reason of cutting off the

water power I place at $1,500. The record contains very little evidence from which I can determine the real extent of such damages, and I can not see my way clear to place it at any greater sum. This does not include anything on account of the store, as I do not consider that a proper element of recovery. It represents the depreciation of the valuation of the mill property by cutting of the water power.

Judgment should be entered for $1,500.

The court evidently rendered its judgment upon the theory that there was a taking of an easement belonging to defendants in error through the destruction of the use of water power for their mill in Miller's Creek by the backing up of water from the lock and dam in the Kentucky River.

The Government's position is that since no land of defendants in error was taken, whatever interest they had in the use of the creek for water-power purposes was subject to the paramount right of the Government to use the bed of the stream within its banks in aid of the navigable capacity of the Kentucky River; that the Government is not liable for the costs taxed in this case.

ASSIGNMENTS OF ERROR.

First. The court erred in concluding as a matter of law that the plaintiffs are entitled to recover of the defendant the sum of one thousand five hundred ($1,500.00) dollars, because the court's findings of facts show that there was no taking of private property

for public use within the meaning of the fifth amendment to the Constitution.

Second. The court erred in adjudging that the plaintiffs recover of the defendant the sum of one thousand five hundred ($1,500.00) dollars.

Third. The court erred in adjudging that the plaintiffs recover of the defendant anything herein, because the findings of fact show that no part of the land or mill is overflowed or covered by a pool stage of water, nor the mill physically damaged thereby.

Fourth. The court erred in adjudging that the plaintiffs recover of the defendant anything herein, because the construction of the lock and dam causes the water above the lock and dam to pool and prevents the drop in the current which is necessary to run plaintiff's mill, as this is not a taking of private property for public use within the meaning of the fifth amendment to the Constitution, but makes out a case of damage without injury; that is, a case sounding in tort and without the jurisdiction of the trial court under the Tucker Act, as amended by the Judcial Code.

Fifth. The court erred in adjudging that the plaintiffs recover of the defendant one thousand five hundred ($1,500.00) dollars or anything herein, because the damages to the plaintiffs' property was purely consequential, speculative, and remote, and there was not a taking of plaintiffs' property for which compensation should be made within the meaning of the fifth amendment to the Constitution.

Sixth. The court erred in adjudging a recovery to the plaintiffs against the defendant for the reason that the damages to plaintiffs' land and property are consequential, speculative, and remote, and the court is without jurisdiction to award damages against the United States in such cases.

Seventh. The court erred in adjudging that the defendant is liable for any costs incurred. Since the repeal by the Judicial Code of section 15 of the Tucker Act there is no provision of law for allowance of costs against the United States in actions under said act.

Eighth. The court erred in entering judgment in favor of the plaintiffs against the defendant.

BRIEF OF ARGUMENT.

I. In view of the fact that no land was taken, whatever interest defendants in error had in the stream flow of the creek was subject to the paramount right of the Government to use the bed of the stream within its banks for aiding the navigable capacity of the Kentucky River.

II. The Government is not liable for the costs taxed in this case.

ARGUMENT.

I.

In view of the fact that no land was taken, whatever interest defendants in error had in the stream flow of the creek was subject to the paramount right of the Government to use the bed of the stream within its banks for aiding the navigable capacity of the Kentucky River.

The question presented under this heading is a very narrow one. The lower court found that there was no taking of land or overflowing of the mill or premises belonging to the defendants in error. The sole issue is whether defendants in error have the right to recover damages from the Government because the damming up of the Kentucky River caused the water to back up in the creek so that at pool stage it was about 1 foot below the crest of their mill dam, thus preventing the drop in the current necessary to run the mill.

The court will undoubtedly take judicial notice that the records of the War Department and congressional action in the form of appropriations show that the Government has been dealing with the navigability of the Kentucky River ever since 1879. Navigability is established by the fact that Congress has since that date exercised "commercial power" over this river.

In Gould on "Waters" (3d ed., sec. 72, p. 145), discussing the case of *McManus* v. *Carmichael,* the author says, * * * "the test of the navigability of the Mississippi River is ascertained by use or by public acts or declarations."

Since the Kentucky River is subject to the control of the Government for navigable purposes, its tributary, Miller's Creek, within its banks, is subject to the uses of the Government for navigable purposes, and any one using the creek for mill purposes does so in subordination to the paramount right of the Government. It is evident that in order to make the river above the dam navigable it was necessary to raise the water. In doing this the water backed up Miller's Creek so as to make the depth at pool stage where the mill of defendants in error was located, 1 foot below the crest of the mill dam, thus preventing the drop in the current necessary to run the mill. In such a situation it would seem logical to say that the owner whose land abuts the creek is in the same position as if he were a riparian owner along the banks of the Kentucky River. Congress in its control of the navigation of the Kentucky River, and the Secretary of War acting for it, must also control its tributaries. Otherwise it would be impossible in most instances to control the navigation of the river. The only way to prevent the water backing up in the creek would be to build a dam where it flows into the river. This would create an impossible situation under ordinary conditions and floods would back up on the inside of the dam and ruin land on both sides of the creek. Moreover, if the main body of the river did not have the use of the creek for storage it might not have water sufficient to make a constant depth for navigation.

Mr. Justice McKenna, in the case of *Greenleaf Johnson Lumber Company* v. *Garrison*, 237 U. S. 251, 263, said:

> When Congress acts, necessarily its power extends to the whole expanse of the stream, and is not dependent on the depth or shallowness of the water. To recognize such distinction would be to limit the power when and where its exercise might be most needed.

If Congress has the power to assume control over and expend money to make the shallow parts of a river navigable by backing up water behind a dam and to control its "whole expanse," it must also have the right to use the bed of a tributary within its banks to aid in regulating the navigable capacity of the river.

In "Gould on Waters" (3d ed. 1900, sec. 72, p. 145), in discussing the case of *McManus* v. *Carmichael*, the author said:

> It was held, upon a full review of the earlier authorities, that, although the ebb and flow of the tide was the common-law test of navigability, yet the term "navigable" embraced not only the idea of *capacity for navigation* but also that of publicity. [Italics ours.]

In the case of the *United States* v. *Rio Grande Irrigation Company*, 174 U. S. 690, 703, the court said:

> Second, that it [the State] is limited by the superior power of the General Govern-

> ment to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take *all needed measures to preserve the navigability of the navigable water courses of the country* even against any State action. [Italics ours.]

United States v. *North Bloomfield Gravel Mining Company,* 81 Fed. 243. Affirmed, 32 C. C. A. 84. Also see Weil on "Water Rights" (3d ed., vol. 1, sec. 337, p. 358).

The language of the act of September 19, 1890 (26 Stat. 454, sec. 10), is suggestive:

> That the creation of any obstruction, not affirmatively authorized by law, to the *navigable capacity* of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. [Italics ours.]

Moreover, if the Government had from time immemorial, and long before the defendants in error or their grantors had used the stream for driving a mill, the right to the use of its bed for the run-off from the watershed above, and these waters aided navigation, it would seem reasonable to say that it had the right to the use of the bed of the creek within its banks for other navigable purposes, including that of backing up the water, so long as no land was taken.

Assuming that the Government had the control of Miller's Creek within its banks for storage purposes above Lock and Dam No. 12 on the Kentucky River, the rights of the defendants in error would be the same as if they had been riparian owners on the banks of the Kentucky River. In *Gibson* v. *United States,* 166 U. S. 276, Mr. Chief Justice Fuller, speaking for the court, said:

> Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard.
>
> * * * * *
>
> In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject.

Bedford v. *United States,* 192 U. S. 217.

Transportation Co. v. *Chicago,* 99 U. S. 635.

Scranton v. *Wheeler,* 179 U. S. 141.

Hood v. *United States,* 49 C. Cls. 669.

Zimmerman v. *Union Canal Co.,* 1 Watts and Sergeants Rep. 346. (Pa.)

Manigault v. *Springs,* 199 U. S. 473.

The Government suggests that the allowance of a claim for damages where no land is taken or easement destroyed, would set a precedent of tremen-

dous importance in the matter of governmental control of the navigability of rivers and harbors.

II.

THE GOVERNMENT IS NOT LIABLE FOR THE COSTS TAXED IN THIS CASE.

The costs in this action were erroneously taxed against the United States.

Prior to the enactment of the Judicial Code costs were properly taxable against the United States under the provisions of section 15 of "An act to provide for the bringing of suits against the Government of the United States," commonly known as the Tucker Act (24 Stat. 505). Section 297 of the Judicial Code, however, repealed all of the Tucker Act with the exception of sections 4, 5, 6, 7, and 10 (36 Stat. 1168). The petition in the case at bar was filed after the Judicial Code became effective and hence there was no provision of law authorizing the taxation of costs against the United States.

In *The Antelope* (12 Wheat. 546, 550) the court said:

> It is a general rule that no court can make a direct judgment or decree against the United States for costs and expenses in a suit to which the United States is party, either on behalf of any suitor or any officer of the Government.
>
> *United States* v. *McLemore,* 4 How. 286.
>
> *United States* v. *Boyd,* 5 How. 291.

United States v. *Verdier,* 164 U. S. 213, 219.

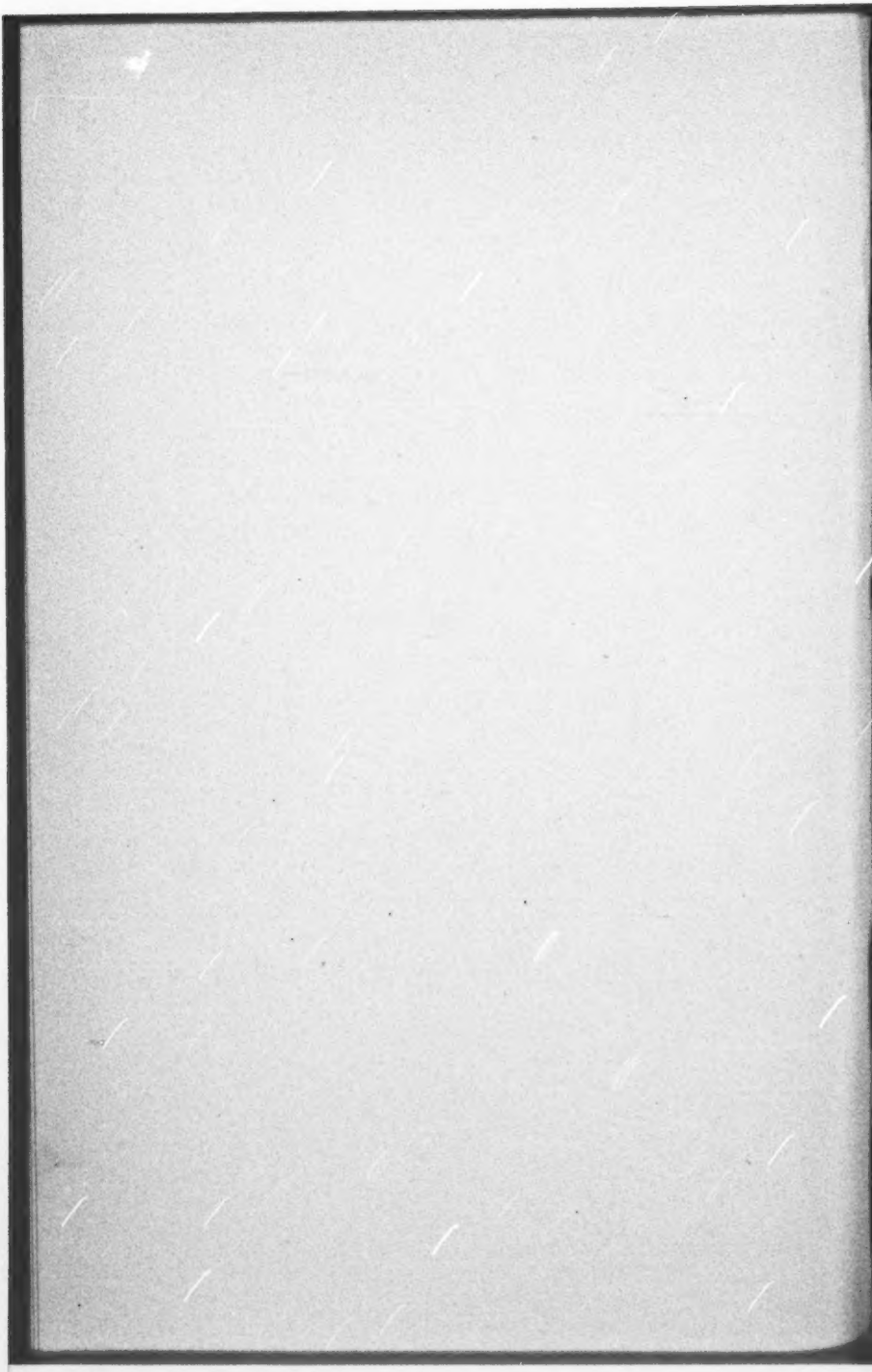
Pine Ridge Logging Co. v. *United States,* 186 U. S. 279, 296.

CONCLUSION.

For the reasons hereinbefore set forth it is respectfully submitted that the trial court erred in rendering judgment for damages against the Government and for costs, and that its judgment should be reversed.

HUSTON THOMPSON,
Assistant Attorney General.

○



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 718.

THE UNITED STATES, PLAINTIFF IN ERROR,

versus

ACHILLES KELLY, GREEN B. KELLY, JR., LILLIAN KELLY CRAWFORD, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR DEFENDANTS IN ERROR.

J. F. WINN,
For Defendants in Error.

WESTERFIELD-ROBTS CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 718.

THE UNITED STATES, - - - - - *Plaintiff in Error,*

versus

ACHILLES KELLY, GREEN B. KELLY, JR.,
LILLIAN KELLY CRAWFORD, ET AL., - *Defendants in Error.*

In Error to the District Court of the United States for the Eastern District of Kentucky.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 718.

THE UNITED STATES, - - - - - *Plaintiff in Error,*

versus

ACHILLES KELLY, GREEN B. KELLY, JR., LILLIAN KELLY CRAWFORD, ET AL., - *Defendants in Error.*

In Error to the District Court of the United States for the Eastern District of Kentucky.

STATEMENT.

This action was brought under the provisions of the "Tucker Act," as modified by "The Judicial Code," to recover the value of property alleged to have been taken and destroyed by the United States as an incident to the improvement of the Kentucky River for the purposes of navigation.

The defendants in error were the owners of two small tracts of land lying on both sides of Miller's Creek in Estill County, Ky., containing a mill, a mill seat, with a dam of masonry fourteen feet in height, and a store house and dwelling. The property was valuable chiefly because of the mill property and the valuable water

power afforded by the milldam across Miller's Creek, a tributary of the Kentucky River. The two tracts contain only about five and one-half acres, and constitute one boundary, and the mill and milldam are situated about one-half mile above the mouth of Miller's Creek. The title to the property is not disputed by the plaintiff in error, and the petition filed by the defendants in error, as plaintiffs in the court below, shows that the title of the defendants in error to the property in controversy, was derived by inheritance from their ancestor, Green B. Kelly, Senior, deceased (Record, page 1), and the record evidence, by authenticated copy of the deed filed with the petition (Record, page 6), establishes the title of Green B. Kelly by purchase from Benton and wife, under said deed, which bears date of January 7, 1867. No answer was filed by the United States, but the allegations of the petition, were by stipulation of the parties, traversed of record in the court below (Record, page 7). No claim of ownership of, or of title to the property was made by the defendant in the court below, and it is assumed that no such claim will be asserted in this court.

The United States acquired its proprietary rights over the Kentucky River by Act of the General Assembly of the Commonwealth of Kentucky, approved January 24, 1880.

Some years after the passage of this act of cession above cited, the United States, acting through its officers and agents, under authority of various acts of Congress, undertook to continue the improvement of the river, which had been begun by the State of Kentucky, and

erected a system of locks and dams, about fourteen in number, and in December, 1909, as shown by this record, completed lock and dam "Number 12," in Estill County, Ky., situated a short distance above the city of Irvine, and about four miles below the mouth of Miller's Creek. The evidence shows, and the trial court has found, that Miller's Creek is not a navigable stream (Record, page 7). The evidence shows that the property as a whole had been diminished in value by the construction of lock and dam "Number 12" in at least the sum of ten thousand dollars ($10,000.00), claimed in the petition, but the court held that the recovery was limited to the destruction of the water power afforded by the mill site and milldam. The court below in its findings of law and fact, says:

> 4th. "That *by reason of the erection of the lock and dam the mill can no longer be driven by water power. The water above the lock and dam, when it is at pool stage, is about one foot below the crest of the milldam, which prevents the drop in the current which is necessary to run the mill.* The property is not otherwise injured by the lock and dam.
>
> 5th. "No part of the land or mill is overflowed or covered by a pool stage of water; nor is the mill physically damaged thereby.
>
> 6th. "Miller's Creek is not a navigable stream.
>
> 7th. "The mill and store were not abandoned for lack of business before the completion of the lock and dam. The store was put out of business by the construction of the dam and suspension of the mill. But the business of the mill and store had fallen off before the construction thereof and without reference to it.
>
> 8th. "The land has not been enhanced in value by the construction of the lock and dam.

9th. "*The damages* sustained by the owners of the mill *by reason of cutting off the water power* I place at $1,500. The record contains very little evidence from which I can determine the real extent of such damages, and I can not see my way clear to place it at any greater sum. This does not include anything on account of the store, as I do not consider that a proper element of recovery. It represents the depreciation of the valuation of the mill property by cutting off the water power.

"Judgment should be entered for $1,500." (Record, page 7.)

Thereupon judgment in favor of the plaintiffs was duly entered for this sum, with interest and costs as provided by law (Record, page 9).

To reverse this judgment this writ of error was prosecuted to this court. The assignment of errors filed contains nine paragraphs, each of which is supposed to assign the commission of a distinct error on the part of the court below (Record, pages 10 and 11). A careful analysis of the assignment of errors discloses that it contains a mere repetition in a slightly different form of the only two errors alleged to exist: *First*, that there was no physical invasion of plaintiffs' property, and therefore no taking within the meaning of the Fifth Amendment of the Constitution. *Second*, that the damages are purely consequential, speculative and remote, and the injury one for which no recovery can be had under the Tucker Act.

ARGUMENT.

The court below has found as a fact, that the milldam belonging to the defendants in error, is so completely submerged by the pool of still or slack water extending above lock and dam Number 12, that it is covered at all times to withn one foot of the crest of the milldam, and that the water power afforded by the milldam is completely cut off and destroyed. It is true that the court found as a fact, that the mill itself was not physically damaged, but it is evident that in the use of this language, the court merely referred to the mill house and the machinery used for grinding contained in the mill, as severable from the water wheel and milldam by which the water power is applied and furnished, and which in combination constitute the water power, which the court finds has been entirely destroyed. The court by its findings, has fixed the value of this submerged dam, in terms of the value of the water power supplied by it, at the sum of $1,500.

We think it must be clear that there has been a physical invasion of the property of these defendants in error, if it be conceded that the milldam and mill site were the private property of the defendants in error. We earnestly insist that this is property, and in itself constitutes a part of the realty owned by the defendants in error. The deed and findings of fact of the court below, show beyond controversy, that the defendants in error owned not merely the land upon which the mill was situated, but also the milldam and mill seat and other

improvements, together with all the rights, privileges and appurtenances belonging to the property. The word mill seat, or its modern synonym, mill site, includes the privilege, in the nature of a franchise, of operating the mill, and includes not only the land occupied by the mill itself, but so much as is necessary for the purpose of operating it (27 Cyc. 510).

In Kentucky, this privilege or franchise could only be acquired by the riparian owner, where the title to the bed of the stream was either in such riparian owner or in the Commonwealth, since the Act of 1797. By the Act of 1797, a riparian owner who desired to establish a grist mill, was empowered to invoke the power of eminent domain for the purpose of establishing a grist mill on his lands. This law contained full and complete provisions for the condemnation of lands above and below, and for the payment to the owners of the lands taken by the applicant to establish a mill, and regulated the toll which might be charged by the owner or operator of such a water mill. By a later act this power was extended to other mills and manufactories useful to the public, and the law in force at the time the mill in controversy was erected, and at the time the defendants in error and their ancestor, through whom they derived title, became the owners of it, was as follows:

> Sec. 1. "A person owning lands on a water course, the bed whereof belongs to him or the Commonwealth, and desiring to build on such lands a grist mill or other mill for manufactory, useful to the public, and needing a dam in or across the water course

or the raising of an established dam, or the cutting or enlarging of a canal, above or below, may by a petition, in writing, filed in the County Court, in which is situate the principal part of the land asked to be condemned, obtain therefrom a writ of *ad quod damnum*, for the purpose of obtaining the necessary condemnation, which shall embrace all the land demanded, whether lying in the same county or not.

* * * Sec. 9. "The applicant to whom such leave may be granted, shall upon paying the several parties entitled thereto compensation ascertained by judgment of the court, or upon paying the same into court for their use, become vested with the fee simple to the land so designated by the inquest and judgment, have a writ of possession therefor and otherwise proceed according to such leave."

2d Revised Statutes (Ky.), page 180.

The Tenth and Thirteenth Sections of the law as it appears in the Revised Statutes, fixed the amount of tolls which could be charged by the operator of a water mill, with penalties for violation of any of the provisions of the law including forfeiture of the mill privilege and of title to the property condemned. We have only cited such of the provisions as serve to shed some light upon the question of ownership of the property and the extent and nature of the estate in it. This being the law as it stood in Kentucky at the time this mill was erected and at the time it was conveyed by deed to the ancestor of the defendants in error, would seem to establish that these defendants in error are the owners not merely of the mill and mill site, but of the bed of the stream itself, since at the time of the application to establish the mill, the law required the applicant either to be the owner of

the bed of the stream or to acquire it from the Commonwealth.

The court has found as a matter of fact, that Miller's Creek is not a navigable stream. It was therefore not navigable even to the most limited extent or within the broadest meaning which can be given to the word "navigable." It was in no sense a public, natural highway, or capable of being used as such. It is well-settled law in Kentucky, that the owner of land through which runs a non-navigable stream, is the owner both of the stream and the bed of the stream itself. As early as 1802, the Court of Appeals of Kentucky, in construing the Act of 1797, said:

> "But if the court should be mistaken in their construction of the act of assembly respecting mills, still, it is manifest, from an inspection of the record, that the law has not been pursued, inasmuch as the record does not show that the property in the bed of the branch was in the Commonwealth, or in the applicant, without which the County Court ought not to have given leave to erect the mill."
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> *O'Bannon* v. *Jackson*, 2 Ky. (Sneed) 201-2.

In the case of *Murray* v. *Preston*, which was an action to enjoin the obstruction of a small creek by water gaps and a milldam erected by the riparian owner, the injunction was granted by the lower court, and its judgment was reversed by the Court of Appeals. In this case the stream in controversy had been declared a navigable stream by Act of the Legislature of Kentucky.

In this opinion the Court of Appeals said:

"The first question is, what is the effect of the Act of the Legislature declaring this creek a navigable stream?

"The Constitution of the State forbids private property being taken for public use without just compensation being previously made. If the creek was not a navigable stream when this act was passed, it was the private property of the owners of the adjoining lands. If it was the private property of the appellant, within the boundary of his land, the Legislature could not divest him of his rights by simply calling it a navigable stream when it was not one in fact. The rule on this subject is thus stated in Cooley on Constitutional Limitations (side page 591).

"The question, what is a navigable stream, would seem to be a mixed question of law and fact; and though it is said that the Legislature of the State may determine whether a stream shall be considered a public highway or not, yet, if in fact it is not one, the Legislature can not make it so by simple declaration, since, if it is private property, the Legislature can not appropriate it to a public use without providing for compensation."

Murray v. *Preston,* 106 Ky. 561.

And continuing, the court in conclusion says:

"Upon the principle that the water is the highway, there can be no highway if the quantity of water is insufficient for its reasonable use for this purpose in ordinary stages of high water. The quantity of water in this creek, its width, its use, and the length of time it remained up in time of freshets, all show that it is only what is commonly known as a 'brook' or 'branch,' and as such was the private property of the appellant."

Ibid. 106 Ky. 166.

It must be evident therefore that the defendants in error and their predecessors in title for more than fifty years, have been the owners of this property, and that they own not merely the land on both sides of Miller's Creek, as shown by the deed, but as such riparian owners own the stream and its bed, including the milldam which was submerged and destroyed as to both its use and value. It was their private property, and there is nothing in this record which even intimates that the United States asserts or has sought to assert any claim of title to it. The findings of fact show that Miller's Creek is not a navigable stream, and this property is located some distance from the river and in no place borders upon the Kentucky River.

The jurisdiction of the United States over the Kentucky River itself, so far as any proprietary right on the part of the Government is concerned, was derived solely from an act of cession by the General Assembly of Kentucky, approved January 24, 1880, which is as follows:

"CHAPTER 58.

"AN ACT to grant the consent of the State of Kentucky to the acquisition by the United States of certain lands within the State, and bordering on the navigable rivers thereof, for the purpose of constructing canals, or of erecting thereon dams, abutments, locks, lock-keepers' dwellings, offices, and all necessary structures for the construction and maintenance of slack-water navigation on said rivers, and ceding jurisdiction over the same, and for imposing fines and penalties for willful injuries to the grounds, buildings, and appurtenances acquired under the provisions of this act.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky, and it is hereby enacted by the authority of the same:

"Sec. 1. That whenever the United States shall make an appropriation, and shall be about to begin the improvement of any of the navigable rivers within or bordering on the State of Kentucky, by means of locks and permanent or movable dams, or dams with adjustable chutes, or by means of a canal, the consent of the State of Kentucky is hereby given to the acquisition by the United States by purchase or by condemnation of any lands, buildings, or other property necessary for the purpose of erecting thereon dams, abutments, locks, lock-keepers' dwellings, chutes, and other necessary structures for the construction and maintenance of slack-water navigation on said rivers, or for the purpose of constructing canals on the same; and the said United States shall have, hold, use and occupy the said land or lands, buildings or other property, when purchased or acquired as provided for by this act, and shall exercise jurisdiction and control over the same concurrently with the State of Kentucky.

"Sec. 2. *Be it further enacted,* That in case of failure of the United States to agree with the owner or owners of any such lands as the United States may deem necessary for the purposes named in the first section of this act, it shall be lawful for the United States to apply for the condemnation of such land by petition to any judge of a court of record in or nearest to the county where the land may be situated, either in term time or in vacation, notice of the time and place of such application having been first duly given, by publication for thirty days prior to the day of such application, in some newspaper of general circulation published in the county where the land lies, or if the owner or owners reside in the State of Kentucky, by personal service upon the owner or owners of such land at least twenty days prior to

such application; and thereupon it shall be lawful for such judge to appoint three disinterested freeholders of the county where such land lies as commissioners, and having been first duly sworn to well and duly appraise the damages due the owner or owners of said land proposed to be taken, shall report, in writing, to the said judge the amount of damages to be paid to the owner or owners of such land, which report, upon confirmation by said judge, shall be held as final and binding upon said owner or owners of said land; and upon the amount of such damages being paid to the owner or owners of said land, the title of such land shall vest in the United States, and said land shall be exempt from all taxes and assessments so long as it shall remain the property of the United States.

"Sec. 3. *And be it further enacted,* That if any person or persons shall willfully or maliciously injure any of the lands, buildings, or other property acquired or held under the provisions of this act, such person or persons shall be liable to a fine of not less than twenty dollars, and to an imprisonment not exceeding six months, or both or either, at the discretion of the court. Said offense to be prosecuted in any court of competent jurisdiction.

"Sec. 4. And for the purpose of enabling the United States to expend the one hundred thousand dollars already appropriated by Congress for the improvement of the Kentucky River, and any further appropriations that may hereafter be made for that purpose, the State of Kentucky hereby transfers and cedes to the United States the five locks and dams heretofore constructed by said State on said river, together with all the grounds and appurtenances belonging to the same; but this transfer and cession is made subject to the lease and privileges heretofore made and granted by said State to the Kentucky River Mills Company, at lock and dam No. 4 on said river; and the provisions of the preceding section

of this act as to the concurrent jurisdiction of said State and the United States over the lands and buildings authorized to be acquired and constructed by said sections, and imposing penalties for injuries to said works, shall extend and apply to the said five locks and dams and their appurtenances hereby transferred and ceded to the United States.

"Sec. 5. This act shall take effect and be in force from its passage.

"Approved January 24, 1880."

Laws of Kentucky, 1879, Vol. 2, page 8, Ch. 58.

The Kentucky River is an inland stream lying wholly as to every drop of its waters, within the borders of the Commonwealth of Kentucky, and many years prior to the act of cession above quoted, had been improved for purposes of navigation by the State of Kentucky. The State had erected five locks and dams in the river, which were expressly ceded by this act to the United States. By the terms of this act of cession, the United States acquired title only to the property actually ceded and actually owned by the Commonwealth of Kentucky, and can not be held to have acquired any paramount title to the private property of the riparian owners of the small streams which are tributary to the river. This, it could only acquire against the will of such owners, by the exercise of the power of eminent domain.

WAS THE DESTRUCTION, BY SUBMERSION, OF THE MILLDAM AND THE CONSEQUENT DESTRUCTION OF THE WATER POWER A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE, WITHIN THE MEANING OF THE FIFTH AMENDMENT?

This record and the findings of facts show conclusively that the private property of these defendants in error has been destroyed by the acts of the officers and agents of the United States, acting under authority of acts of Congress. There can be no question that there has been an actual physical invasion of their property by flooding it to such an extent that their milldam is almost entirely submerged at all times, and its use and value entirely destroyed. It is equally beyond dispute that the government makes no claim of title to the property or any part of it. An examination of the decisions of this court, will demonstrate that such action constitutes a taking within the meaning of the Fifth Amendment. The leading case upon this subject is *Pumpelly* v. *Green Bay Canal Company*, reported in 13 Wallace, page 166, which was an action for damages caused by the improvement of Fox River, a navigable stream, and which involved the construction of a provision of the Constitution of Wisconsin, which this court in the opinion by *Mr. Justice* Miller, says was in almost identical language with the provisions of the Fifth Amendment. In this case, this court said:

"The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government has a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that *if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation,* because, in the narrowest sense of that word, it is not taken for public use. *Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law,* instead of the government, *and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.*"

In this case the court cited with approval *Sinnickson v. Johnson*, 2 Harr. (N. J.) 129, in which Dayton, Judge, said:

"That this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably con-

nected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

Continuing, the court cites with approval the decision of *Chancellor* Kent in the case of Gardner v. Newburgh, 2 Johns, Ch., 162, in which the learned Chancellor held that the diversion of water from plaintiff's lands was a taking for public use.

These cases were decided in the absence of any express provision of the Constitution of either of the States in which they arose, and this court then in the opinion above quoted, proceeded as follows:

> "If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the *Constitution, it would become an instrument of oppression rather than protection to individual rights.*
>
> "But there are *numerous authorities* to sustain the doctrine that a *serious interruption to the common and necessary use* of property *may be*, in the language of Mr. Angell, in his work on water courses, *equivalent to the taking of it*, and that under the constitutional provisions *it is not necessary that the land should be absolutely taken.* Ang. Wat., Sec. 465-a; *Hooker* v. *N. Haven and Northhampton Co.*, 14 Conn. 146; *Rowe* v. *Granite Bridge Co.*, 21 Pick. 344; *Canal Appraisers* v. *People*, 17 Wend. 604; *Lackland* v. *North Mo. R. R. Co.*, 31 Mo. 180; *Stevens* v. *Prop. of Middlesex Can.*, 12 Mass. 466. * * *
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> "* * * We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked, that for a consequential injury to the property of the individual arising from

the prosecution of improvements of roads, streets, rivers and other highways for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that *it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material,* or by having any artificial structure placed on it, so *as to effectually destroy or impair its usefulness, it is a taking* within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle." *Pumpelly* v. *Greenbay Canal Co.,* 13 Wallace, 560-561.

The case of *Monongahela Navigation Company* v. *United States,* 148 U. S. 312, was an action for the value of certain locks and dams owned by the plaintiff, and erected under authority of acts of the Legislature of Pennsylvania in the Monongahela River, and which were appropriated under acts of Congress. In the opinion of this court in that case, *Mr. Justice Brewer,* after a review of the authorities, says:

"In this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature, it was well said by *Mr. Justice* Bradley, for the court,

in *Boyd* v. *United States,* 116 U. S. 616, 635 (29, 746, 752): 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that *constitutional provisions for the security of person and property should be liberally construed.* A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be *obsta principiis.*'' *Monogahela Navigation Co.* v. *United States,* 148 U. S. 325.

And again after asserting the power of Congress to take the property involved in that action, under the power to regulate commerce, this court in the case just quoted, said:

> ''But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. *The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads;* but if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. * * *

"Whatever be the true value of that which it takes from the individual owner, must be paid to him before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of *the equal necessity of paying full compensation for all private property taken there can be as little doubt. If a man's house must be taken, that must be paid for; and if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken.*" *Ibid.* 148 U. S. 336, 337.

In the case at bar, the mill and milldam were erected on a non-navigable stream, under authority granted by the Commonwealth of Kentucky. The right to establish and operate a mill is in the nature of a franchise, and the law establishes the toll which may be taken. It is now, and has been from the very inception of the Commonwealth, regarded as a public utility, with the right to invoke, on behalf of the riparian owner, the exercise of the power of eminent domain, in order to establish such a mill and secure a mill privilege or franchise. The mill with its dam and appurtenances was real estate and the franchise to take toll of grain ground by it was a vested property right, which could no more be taken without just compensation than the land or dwelling

house of these defendants in error. The opinion in the case last quoted continues as follows:

> "The theory of the government seems to be that the right of the Navigation Company to have its property in the river, and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the government in the exercise of its supreme power assumes control of the river, it destroys both the right of the company to have its property there, and the franchise to take tolls. But this is a misconception. *The franchise is a vested right. The State has the power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though superior, power exists in the national government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can any private property belonging to an individual.* * * *
>
> "The *power which Congress possesses* in respect to this taking of property *springs from the grant of power to regulate commerce,* and *the regulation of commerce implies as much control, as far-reaching power,* over an *artificial* as over a *natural* highway They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. There may be differences in the modes and manner of using these different highways, but such differences do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads, and railroads, constructed under the authority of the States, and the improvement of natural highways

carried on by the general government, that at first it might seem that there was some inherent difference in the power of the national government over them. But the grant of power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of highway. The fee of the soil in neither case is in the general government, but in the State or private individuals."

Ibid. 148 U. S. 341, 342.

In the instant case the reasoning of the court in the case just cited, applies with even greater force, for here the property taken is on a stream which is not navigable in any sense of the word, and as far as this record discloses, is absolutely incapable of being made navigable. It is in no sense a natural highway by water, and is incapable of being made navigable except by purely artificial means.

This court in a number of subsequent cases, has approved the doctrine laid down in the cases we have cited. The fullest and latest decision of this court, in which all of the earlier cases are reviewed and harmonized or distinguished, is the case of the *United States* v. *Lynah,* 188 U. S. 446. It was a suit to recover for land taken by flooding, as an incident to the improvement of navigation in the Savannah River, under acts of Congress. This case is directly in point, and Mr. Justice Brewer in the opinion of the court after a careful review of authorities, says:

"*It is clear from these authorities that where the government by the construction of a dam* or other public works *so floods lands belonging* to an individual *as to substantially destroy their value*

there is a taking within the scope of the Fifth Amendment. While the government *does not* directly proceed to *appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested.*"

United States v. *Lynah*, 188 U. S. 470.

And again in discussing the question of consequential damages, the court in that case said:

> "Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others, it is an injury which is purely consequential, and for which the government is not liable. But *if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it can not do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation.*"
>
> *Ibid.* 188 U. S. 471.

The court in that case held that the lands must be regarded as taken and irreclaimable, saying in conclusion:

> "Here there is no finding, no suggestion, that by any expense the flooding could be averted. We may, of course, know that there is theoretically no limit to that which engineering skill may accomplish. We know that vast tracts have in different parts of the world been reclaimed by levees and other works, and so we may believe that this flooding may be prevented, that some day all these submerged lands may

be reclaimed. But as a practical matter, and for the purposes of this case, we must, under the findings, regard the lands in controversy as irreclaimable and their value wholly and finally destroyed.

"Therefore, following the *settled law of this court*, we hold that *there has been a taking of the lands for public uses*, and that the government is under *an implied contract to make just compensation therefor.*"

Ibid. 188 U. S. 474.

In the case at bar there is not the slightest intimation that the flooding of the milldam and the consequent destruction of the water power, can by any skill or expense be obviated. The dam, by its submersion, is as entirely destroyed as to its only use or value, as if it had been removed or annihilated. There is no suggestion in this record as to any use or value it may have in its present condition. The findings show that it is utterly destroyed, and therefore taken in the light of these authorities. There is no question presented here of consequential damages. No damages whatever are allowed by the court below in its findings of fact and law for injury to the residue of the property, which the court held was not physically damaged. The findings of the court below were expressly limited to the actual value of that portion of the property which was entirely destroyed, and while we insisted that the proper measure of damages was the difference in value of the entire property just after it was flooded and just before it became known that it would be so flooded, there was no application on behalf of defendants in error for a writ of error or appeal,

and they stand upon the judgment of the trial court for the amount awarded to them for the property which was physically invaded and utterly destroyed.

THIS ACTION DOES NOT SOUND IN TORT.

This court has so often held that cases presenting a similar state of facts to that presented by this record do not "sound in tort" that we deem it necessary to cite but two cases, which, with those already cited, seem to settle this question in favor of our contention. In the case of the *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645, *Mr. Justice* Harlan, for the court, says:

> "The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken pursuant to an Act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court of claims, of actions found upon any contract, express or implied, with the Government of the United States."
>
> *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 657 (28 Law Ed. 850).

The case of *United States* v. *Welch*, 217 U. S. 333, was an action for damages for flooding land, and the principal element of damage was the taking, by flooding, of a private right of way leading from the plaintiff's lands over the lands of another to the county road. (The damage complained of was caused by the construction of

lock and dam Number 10 in the Kentucky River.) The value of this easement was fixed by the court in his findings, at seventeen hundred dollars ($1,700), and this court held:

> "The petition, like the form of finding, lends some countenance to this contention, by laying emphasis on the damage to the farm, although it is to be noted that, even in this aspect, the damage is to the tract of which a part is taken. 191 U. S. 354. But both petition and finding in substance show clearly that the way has been permanently cut off. A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay. But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end. Miller v. Horton, 152 Mass. 540, 547, 10 L. R. A. 116, 23 Am. St. Rep. 850, 26 N. E. 100. The same reasoning that allows a recovery for the taking of land by permanent occupation allows it for a right of way taken in the same manner; and the value of the easement can not be ascertained without reference to the dominant estate to which it was attached. *The argument is only confused by reference to cases like Gibson* v. *United States,* 166 U. S. 269, 41 L. Ed. 996, 17 Sup. Ct. Rep. 578; *Harvard College* v. *Stears,* 15 Gray, 1; *Smith* v. *Boston,* 7 Cush. 254, etc., where it was held, although there are decisions the other way, that a landowner can not recover for the obstruction of a public water course, the discontinuance of a public way, or the like. *The ground of such decisions is that the plaintiff's rights are subject to superior public rights, or that he has no private right, and that his damage, though greater in degree than that of the*

rest of the public, is the same in kind. Here there is *no question* of the *plaintiff's private right.*"

United States v. *Welch*, 217 U. S. 338, 339 (54 L. Ed. 789, 790).

In view of the language of the court above quoted, we have deemed it inadvisable to discuss or distinguish cases like those mentioned in this decision.

These cases and others of like import which have been so often explained and distinguished in the decisions of this court in cases like the one here presented, were cited and relied upon by counsel for plaintiff in error, in the court below. This court by the decision which we have last quoted has placed its ban of disapproval upon their citation.

We earnestly insist that the milldam and mill site form a part of the real estate of the defendants in error, and although the court says: "No part of the land or mill is overflowed or covered by a pool stage of water," the findings of fact taken together show that the word "land," as used in this connection in the "fifth" finding of fact, is used in its *ordinary* and not in its *legal* sense. The findings of fact show conclusively that the milldam and the bed of the stream below it are entirely submerged, and that the only value of the dam, namely, the water power afforded by it, is entirely cut off and destroyed.

The doctrine that there may be a partial taking which will entitle the landowner to compensation *pro tanto*, is so well established by decisions of this court, and is so clearly sustained by this last case above quoted, that we have deemed it needless to cite other authorities.

COSTS.

In our statement of the questions of law presented by the assignment of errors, we failed to notice the alleged error set out in the assignment numbered "Seventh," namely:

> "The court erred in adjudging that the defendant is liable for any costs incurred. Since the repeal by the Judicial Code of Section 15 of the Tucker Act there is no provision of law for allowance of costs against the United States in actions under said act." (Record, page 11.)

We refrained from discussing this question because we felt that counsel for the defendant below overlooked the fact, that while Section 15 of the Tucker Act was repealed by Section 297 of the Judicial Code, it was expressly re-enacted without change in *ipsissimis verbis,* as Section 152 of the Judicial Code:

> "Sec. 152. (*Costs may be allowed prevailing party.*) If the Government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court. (36 Stat. L. 1138.)"

The Act of March 3, 1911, Chapter 231, titled "The Judicial Code," was an act to *codify, revise and amend the laws relating to the judiciary,* as shown by the enacting clause and as appears from the provisions of the act itself. The law allowing costs as against the United

States remains as it was before the passage of the act, in the discretion of the trial court. The court below by its judgment adjudged costs "to be taxed by the clerk in accordance with the provisions of the statute in such cases made and provided." (Record, page 9.)

Even had Section 152 of the judicial Code been omitted, the judgment in this form would not be reversible error, for if no costs are allowed by the statute, none are allowed by the judgment.

We earnestly submit that we have demonstrated from this record that the private property of these defendants in error has been taken for public uses within the meaning of the Fifth Amendment to the Constitution. The findings of fact show that only the value of the property actually taken or destroyed, has been allowed in damages, and it follows therefore, that this action is upon an implied contract to make compensation and not an action sounding in tort.

Believing that we have demonstrated that there is no error shown in this record, we submit this cause in the confident hope that the judgment of the lower court will be affirmed.

Respectfully submitted,

J. F. WINN,

For Defendants in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 718.

THE UNITED STATES, PLAINTIFF IN ERROR,

versus

ACHILLES KELLY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

J. F. WINN,
For Defendants in Error.

WESTERFIELD-BOOTH CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 718.

THE UNITED STATES, - - - - *Plaintiff in Error,*

versus

ACHILLES KELLY, ET AL., - - *Defendants in Error.*

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

We crave the indulgence of the court to a response, to the brief for the Government, by a supplemental brief, because the original brief for defendants in error was prepared and printed before we had any opportunity of seeing the brief for the Government filed by the Assistant Attorney-General, Mr. Huston Thompson. We could not, of course, anticipate the novel contentions of counsel, the legal effect of which is:

(1) That a milldam of solid masonry on a small non-navigable stream is merely an easement; and

(2) That the natural channel of a non-navigable stream forms a part of the bed or natural channel of the river of which it is a tributary, no matter how far it may be situated from the point of confluence.

It would seem that the mere statement of these astounding propositions would afford their refutation.

As to the first proposition, the findings of fact show that the milldam is submerged to within one foot of its crest when water is at pool level above Lock and Dam No. 12—a condition that can only exist when there is no flow of water whatever in the river. This condition has not existed in the Kentucky River since this lock and dam was built and for nearly the entire time of each year the water at ordinary stage completely covers the submerged dam, including its crest, as shown by the evidence. Not only is the dam completely submerged, but the necessary and unavoidable consequence of its submersion is, that the water power afforded by it and which constitutes its only use and value, is entirely cut off and destroyed as shown by the findings of fact. The milldam is a structure of masonry, built upon land, and as such structure is *"land"* as much as a dwelling or any other structure which forms a part of the real estate it occupies. The court has found its value in terms of the water power afforded by it. The court has found that the defendants own not merely the land upon which the mill is situated, but the mill and mill-site, including the right of backing the water above the milldam upon the lands above and of free and uninterrupted flowage of water below in the natural bed and channel of the creek. It was for this real property which was physically invaded and destroyed as well as the appurtenant easement for which the damages fixed by the trial court were allowed. That such a structure is real estate presents a proposition so

elementary as not to admit the citation of authority. (See *Cyc.*, 27, 510, 511.)

The second proposition that the United States, having, taken control of a navigable stream, and, undertaken its improvement for purposes of navigation, must be held to have thereby acquired proprietary rights superior to the private rights of the riparian owners of such small, navigable streams as are tributaries to it, is so astounding, it would seem only necessary to say, that carried to its logical conclusion, such contention would place not merely the entire valley of the river but the entire watershed of a navigable river under the control of Congress to such an extent, that every acre of land in the watershed might be taken by the United States without liability on the part of the Government to make compensation.

The *superior or dominant right of the Government over the waters of a navigable stream ends with the natural banks and channels of the river.* The banks remain where nature has placed them and can not be changed by legislation so as to affect private rights of ownership without making just compensation as required by the Fifth Amendment. (See *United States* v. *Jackson*, 230 U. S. 1; *United States* v. *Hughes*, 230 U. S. 24; *Hooper* v. *Hobson*, 57 Me. 273, 99 Am. Dec. 770; *Murray* v. *Preston*, 106 Ky. 561.)

This question was discussed by this court in the late case of *Cubbins* v. *Mississippi River Com.* (241 U. S. 351). The court in that case, *Mr. Chief Justice* White writing, says:

"That view would be here irrelevant, since there is no suggestion of any bed of the river in high or low water except the space between the natural banks along which the levees were built, unless the whole valley be considered as such bed. Indeed from the face of the bill it is apparent, that the rights relied upon were assumed to exist upon the theory, that the valley through which the river travels, in all its length and vast expanse, with its great population, its farms, its villages, its towns, its cities, its schools, its colleges, its universities, its manufactories, its network of railroads—some of them trans-continental—are virtually to be considered from a legal point of view as constituting merely the high-water bed of the river, and therefore subject, without any power to protect, to be submitted to the destruction resulting from the overflow by the river of its natural banks."

Continuing, the court says:

"Additionally, when the principle laid down in the Jackson case is illustrated by the ruling which was made in the Hughes case, it becomes apparent that the contention here urged as to the identity between the great valley and the flood bed of the river was adversely disposed of, since under no view could the ruling in the Hughes case have been made except upon the theory that the bank of the river was where it was found, and did not extend over a vast and imaginary area." (241 U. S. 368, 60 L. Ed. 1049.)

The contention of counsel in the case just quoted and that of counsel in the instant case, grow out of the confusion which arises from attempts on the part of counsel to apply the rules of the common law applicable to the ownership of property situated on navigable waters as there understood, *i. e.*, "where the tide ebbs and flows"

to inland streams where they can have no just application. In the one case the tides are subject to fixed laws; and "mean high-water marks" can be easily established. In the other, there can, in the very nature of things, be no established "mean high-water mark," as the floods in such rivers are governed by no law save such as are both unknown and unknowable.

In the case of *The United States* v. *Grizzard*, 219 U. S. 180, the contention on behalf of the Government was that the easement of access destroyed and therefore taken, did not constitute property for which compensation could be required, but the court after distinguishing that case from the cases cited in support of the contention, said:

> "But here there has been an *actual taking by permanently flooding a part of the farm* of the defendants in error. An incident of that flooding is that a public road running across the flooded land is also flooded. But if this were not so, and the roadway had simply been cut off by the interposition of the flooded portion of the farm, the damage would be the same. Since, therefore, there has been a taking of a part of the owners' single tract, and damage has resulted to the owners' remaining interest by reason of the relation between the taken part and that untaken, or by reason of the use of the taken land, the rule applied in the cases cited does not control this case." (*Ibid.* 219 U. S. 183.)

And continuing the opinion of this court in that case, citing with approval the case of *United States* v. *Welch*, 217 U. S. 333, says:

> "Both the petition and the finding show that access to the public road has been cut off by the intervention of flooded land actually taken.

"That the trial judge found the damages for the land and for the easement of access separately is not controlling. The determining factor was that the value of that part of the Grizzard farm not taken was $1,500, when the value of the entire place before the taking was $3,000. A judgment for a less sum will not be that 'just compensation' to which the defendants are entitled. The case is not different in legal consequence from what it would have been if a railway had been constructed across one's lawn, cutting the owner off from his road and outbuildings, etc. To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice." *Ibid.* 219 U. S. 185-6.

In the case at bar, not only is the milldam submerged but the water rights and mill privilege are also destroyed. These cases with those cited in our original brief would seem to make it unnecessary to refer to the authorities cited by counsel for the Government. When the latter authorities are analyzed, they demonstrate that there was no physical invasion of any private property in any of them, and, that they were cases of mere interference with, or interruption of, the private right of access to navigability, or claims for damage growing out of mere *riparian rights* of ownership *in submerged land in the bed of navigable waters.* The distinction between such claims and that presented by the instant case is clearly drawn by this court in the case of *Scranton* v. *Wheeler,* 179 U. S. 141.

This was an action to require the removal of structures erected on submerged land which impaired the plaintiff's right of access to navigation, or for compensation, and this court held that the question of title of the riparian owner was determined by the laws of the State of Michigan in which the property in controversy was situated. In the opinion in that case *Mr. Justice* Harlan, for the court, said:

> "Whatever the nature of the *interest* of a riparian *owner in the submerged lands* in front of his upland bordering on a public navigable water, his *title is not as full and complete as his* title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, *not at his absolute disposal, as is his upland,* but to be held at all times *subordinate to such use of the submerged lands and of the waters flowing over them* as may be consistent with or demanded by the *public right of navigation.*" 179 U. S. 163.

Manigault v. *Spring,* 199 U. S. 473, was a suit to enjoin the erection of a dam in Kinlock Creek, a tributary of the Santee River in South Carolina on the ground that Kinlock Creek was a navigable stream and that the dam interfered with plaintiff's right of access to his land and necessitated the raising of dykes on Minim Creek on the opposite side of the river to prevent overflow of his land. The court overruled the motion for injunction and this court affirmed the decision, and discussing the authorities, says:

> "We think *the rule* to be gathered from these cases *is that where there is a practical destruction or material impairment of the value of plaintiff's*

lands, there is a taking which demands compensation." Ibid. 199 U. S. 484.

The court in the case last cited, after referring to *Gibson* v. *United States,* 166 U. S. 269, distinguishes it from the cases we have cited and throws additional light upon the decision in that case. Gibson v. United States was a case in which the court said there was no physical invasion of the plaintiff's property but that the construction of piers on submerged land in front of her property made her access to navigability more inconvenient. There was no flooding of her land and the court held that the damage was purely consequential.

Bedford v. *United States,* 192 U. S. 217, was a case of alleged damage by erosion caused by the erection of a revetment on the Mississippi River which did not change the course of the river. The damage claimed was for gradual erosion of land and the court held that there was no taking and no actual invasion of the premises.

Jackson v. *United States,* 230 U. S. 1, was a case in which the Government had constructed a levy to prevent overflow from the Mississippi River where its right to do so was unquestionable and the damage complained of resulted from the failure on the part of the Government to construct levees at other places on the river, which the Government was under no legal duty to do, and the court held that for such damage there could be no recovery.

Hughes v. *United States,* 230 U. S. 24, was a case where the Government in conjunction with the local au-

thorities had constructed a new levee several miles back from the bank of the Mississippi River in the rear of the property claimed to be damaged for the two-fold purpose of improving navigation and of preventing damage to vast areas of property beyond the levee from unusual and accidental floods in the Mississippi River and had failed to construct levees or strengthen those already existing on the river banks in front of the property. The new levees were several miles in the rear of the Timberlake plantation, the property claimed to have been damaged, and nowhere came in physical contact with it. The contention was that by the erection of this new levee the Government had changed the channel of the river and thrown the whole of this plantation in the bed of the stream. The court in that case held that the bed of the stream was unchanged and remained within its natural banks as before the construction of the levee and that there was no liability on the part of the Government under such a state of facts to make compensation.

Greenleaf Johnson Lumber Co. v. *Garrison*, 237 U. S. 251, was a case in which the plaintiff had constructed a log pool formed by piers on fills extending into navigable waters (outside or harbor lines as they then existed and had been theretofore established by the Secretary of War) and a wharf connecting the ends of these piers or fills. The harbor lines were afterwards extended by the Secretary of War which required the removal of these structures, the resultant injury was held to be one for which no compensation could be had on the ground that the right to *place obstructions in the bed of navigable*

waters was not an *absolute* but a *qualified right* and *subject to the dominant and superior right of public navigation.*

We believe that all the cases cited in the brief for the Government, when analyzed and distinguished as they have been by this court, will be found authorities in favor of our contention and certainly do not support in any case cited the contention of counsel for plaintiff in error in the instant case.

Respectfully submitted,

J. F. WINN,

For Defendants in Error.